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No. 02-1624

In The

SUPREME COURT OF THE UNITED STATES

October Term, 2003

ELK GROVE UNIFIED SCHOOL DISTRICT,
and DAVID W. GORDON, Superintendent, EGUSD,
Petitioners,

vs.

MICHAEL A. NEWDOW,
Respondent,

On Writ of Certiorari from the United States Court of Appeals for the Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

I. Whether respondent has standing to challenge as unconstitutional a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance.

II. Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.

LIST OF PARTIES

In addition to the names of the parties contained in the caption of this case, additional parties at the District Court and Appellate levels included the United States Congress; The United States of America; George W. Bush*, President of the United States; the State of California; the Sacramento City Unified School District; and Jim Sweeney, Superintendent of the Sacramento City Unified School District.

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* George W. Bush was substituted for his predecessor, William Jefferson Clinton, as President of the United States. Fed.R.App.P. 43(c)(2).

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OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, filed on February 28, 2003, is reported at *Newdow v. United States Congress*, 328 F.3d 466 (*Newdow II*). The original opinion was filed on June 26, 2002, and is reported at *Newdow v. United States Congress*, 292 F.3d 597 (*Newdow I*). Both the amended and original opinions are reprinted, respectively, in the Appendix to the Petition for Writ of Certiorari, pages 1-24 and 25-56.

The order of the United States Court of Appeals for the Ninth Circuit denying rehearing and rehearing *en banc*, filed February 28, 2003, is reported at *Newdow v. United States Congress*, 321 F.3d 772, and is reprinted in the Appendix to the Petition for Writ of Certiorari, pages 57-86.

The opinion of the United States Court of Appeals for the Ninth Circuit wherein the Court held that Respondent has standing to assert his claims, filed December 4, 2002, is reported at *Newdow v. United States Congress*, 313 F.3d 500, and is reprinted in the Joint Appendix, pages 138-148.

The memorandum order of the United States District Court for the Eastern District of California of July 21, 2000, granting Petitioners' Motion to Dismiss, is reported at *Newdow v. Congress of the United States*, 2000 U.S. Dist. LEXIS 22366, and is reprinted in the Appendix to the Petition for Writ of Certiorari, page 97.

The memorandum findings and recommendation of United States Magistrate Judge Peter A. Nowinski for the United States District Court for the Eastern District of California of May 25, 2000, recommending Petitioners' Motion to Dismiss be granted is reported at *Newdow v. Congress of the United States*, 2000 U.S. Dist. LEXIS 22367, and is reprinted in the Joint Appendix, pages 78-80.

JURISDICTION

On June 26, 2002, the Ninth Circuit entered its original judgment. Thereafter, on February 28, 2003, the Court issued an amended opinion after rehearing. The Ninth Circuit then issued an order staying its mandate on March 4, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND POLICIES AT ISSUE

First Amendment To The United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances.

36 U.S.C. § 1972 (As amended June 14, 1954, now codified at 4 U.S.C. § 4 (1998))

I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all.

California Education Code § 52720 (1989)

In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity, at which the majority of the pupils of the school normally begin the school day, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of

Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.

In every public secondary school there shall be conducted daily appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy such requirement. Such patriotic exercises for secondary schools shall be conducted in accordance with the regulations which shall be adopted by the governing board of the district maintaining the secondary school.

Elk Grove Unified School District Policy AR 6115

The pertinent portion of Elk Grove Unified School District policy AR 6115 states as follows:

> <u>Patriotic Observances</u>
> <u>Elementary Schools</u>
>
> Each elementary school class recite the pledge of allegiance to the flag once each day.

STATEMENT OF THE CASE

A. Facts Giving Rise To This Case

An amendment to 36 U.S.C. § 1972, enacted on June 14, 1954, now codified at 4 U.S.C. § 4 (1998) ("the 1954 Act"), added the words "under God" to the Pledge of Allegiance ("Pledge"). California Education Code section 52720 requires appropriate patriotic exercises be conducted in every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity which the majority of the students of the school normally begin the school day. Recitation

of the Pledge satisfies the requirements of this section. *Id.*

Pursuant to an Elk Grove Unified School District ("EGUSD") policy, elementary school teachers begin each school day by leading their students in reciting the Pledge in conformity with section 52720 of the California Education Code. In pertinent part, EGUSD policy AR 6115 states: "Each elementary school class recite the pledge of allegiance to the flag once each day." J.A. 149-150.[1]

Respondent is an atheist and the noncustodial parent of a minor child who attends a public elementary school in the EGUSD. J.A. 48, 82. He objects to his minor child hearing and observing willing students recite the Pledge each morning because it includes the phrase "under God." J.A. 49.

On February 6, 2002, Sandra Banning, the mother of Respondent's daughter, was awarded sole legal custody of their child. J.A. 82. Specifically, an order entered by the California Superior Court on that date indicates: "The child's mother, Ms. Banning, to have sole legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of [First Name Redacted] Banning." (Emphasis in original) J.A. 82, 88. While both parents are to consult with one another on substantial decisions relating to non-emergency medical care, dental, optometry, psychological and educational needs of their daughter, Ms. Banning is the final decision maker if the parents are unable to agree. J.A. 88. On September 17, 2003, that order was modified to reflect that Respondent has joint custody, but Ms. Banning remained the final decision maker.

Respondent's daughter: (1) is a Christian who regularly attends church; (2) believes in God; (3) does not object to and is

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1 "J.A." refers to the Joint Appendix. "App." refers to the Appendix to the Petition for Writ of Certiorari. References to the District Court docket record will be designated "D.Ct."

not uncomfortable with either personally reciting, or hearing others recite, the Pledge; and (4) does not object and is not uncomfortable with the Pledge's reference to God. J.A. 83. Neither Ms. Banning, nor her daughter, believe her daughter is coerced by having to recite the Pledge or in hearing the words "one Nation under God" recited. The recital of the Pledge is consistent with her daughter's upbringing, as well as the environment in which Ms. Banning wants her to be educated. J.A. 84-85. It is the intent of both Ms. Banning and her daughter that her daughter will recite the pledge daily as currently codified, including the phrase "one nation under God." J.A. 85.

B. The Initial Proceedings

On March 8, 2000, Respondent filed suit against Petitioners and others in the United States District Court for the Eastern District of California, seeking declaratory and injunctive relief, but not damages. Respondent alleges that his minor daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that our's (sic) is 'one nation under God.'" J.A. 49. He contends this results in the inculcation[2] of religious beliefs which are contrary to his own beliefs. J.A. 49.

Respondent does not allege that Petitioners require his daughter to participate in the recitation of the Pledge. Instead, he alleges he contacted EGUSD Superintendent, Petitioner David

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2 It is interesting to note that Respondent fears Petitioners will inculcate religious beliefs in his daughter through having her, at the least, listen to other students recite the Pledge with the phrase "under God." From his allegations, she apparently was "inculcated" with the Pledge at the age of four – even before she became a student of EGUSD. J.A. 69.

Gordon, regarding the Pledge and that Dr. Gordon informed him that the EGUSD's attorneys had advised that federal law allows recitation of the Pledge as long as students are free not to participate. J.A. 56-57. Thus, Respondent's daughter is not required to recite the Pledge.

In his Complaint, Respondent utilizes 42 U.S.C. § 1983 to challenge the constitutionality of Petitioner's policy requiring teachers to lead willing students in reciting the pledge. J.A. 25, 47. Respondent also challenges the constitutionality of section 52720 of the California Education Code as well as the 1954 Act. J.A. 41-47.

Petitioners and other Defendants filed a motion to dismiss Respondent's complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. D.Ct. 6, 7. Magistrate Judge Nowinski held a hearing on this motion, wherein Petitioners requested that Magistrate Judge Nowinski issue a ruling concerning the constitutionality of the Pledge and defer ruling on other issues. Petitioners were joined in this motion by the United States Congress, the United States, and the President of the United States. Magistrate Judge Nowinski reported his findings and recommended the entry of a judgment of dismissal finding the EGUSD's policy did not violate the First Amendment. J.A. 78-80. These findings and recommendations were adopted on July 21, 2000, by District Judge Milton J. Schwartz. App. 97.

C. The Appeal

On July 26, 2000, Respondent filed a notice of appeal from the District Court's Order of dismissal. D.Ct. 23. On June 26, 2002, the Ninth Circuit issued a published opinion, wherein a split panel reversed the District Court's decision and vacated the Judgment of Dismissal with respect to the claims regarding the constitutionality of the 1954 Act and EGUSD's policy and practice

of teacher-led recitation of the Pledge. App. 25-56. The *Newdow I* majority remanded the case for further proceedings consistent with its holding. App. 50-51. Contrary to the District Court's findings, the *Newdow I* majority found that the 1954 amendment to the Pledge wherein the words "under God" were added rendered the Pledge unconstitutional. App. 50. The *Newdow I* majority also found the EGUSD's practice of teacher-led recitation of the Pledge with the phrase "under God" to be a violation of the Establishment Clause. App. 50.

On June 27, 2002, the Ninth Circuit stayed its judgment and the issuance of the mandate. Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing *en banc*.

Thereafter, Ms. Banning filed a motion to intervene in the action with the Ninth Circuit. On December 4, 2002, the same panel that issued the June 26, 2002, decision issued an opinion denying Ms. Banning's motion to intervene. J.A. 138-48. In so doing, the Court also affirmed its June 26, 2002, decision finding that Respondent, as a noncustodial parent, has standing to challenge the constitutionality of the Pledge and the EGUSD's Pledge recitation policy. J.A. 147-48.

On February 28, 2003, the Ninth Circuit denied Petitioners' Petition for Rehearing and Suggestion for Rehearing *en banc*. App. 57-86. The *Newdow II* majority issued an amended opinion that same day analyzing the constitutionality of the EGUSD's Pledge recitation policy only. App. 1-24. The *Newdow II* majority concluded that EGUSD's Patriotic Observance policy violates the Establishment Clause, but did not expressly opine on whether the Pledge itself violates the First Amendment. App. 1-24.

SUMMARY OF THE ARGUMENT

1. Respondent lacks standing to bring this suit because he has not suffered a distinct and palpable injury as required under

Article III of the U.S. Constitution. Respondent is a noncustodial parent of a minor child who attends school in the EGUSD. It is axiomatic that state custody proceedings circumscribe the constitutional rights of parents. In the state court custody case, Respondent was given joint custody of his minor child; however, the state court expressly granted the final decision making authority over the educational and religious upbringing to the mother, Ms. Sandra Banning. In determining whether Respondent had standing to assert the claims in this case, the Ninth Circuit Court of Appeals incorrectly relied on case law in which the parents had full parental rights. Whereas the Seventh Circuit adopted the proper legal standard in *Navin v. Park Ridge School Dist. 64*, 270 F.3d 1147 (7th Cir. 2001) to determine whether a noncustodial parent has standing to bring a claim which arises out of the relationship with his minor child. The Seventh Circuit correctly recognized that the standing of a noncustodial parent depends on the rights set forth in the custody order; to the extent the noncustodial parent's claims seek relief which is incompatible with the rights exercised by the custodial parent, the noncustodial parent lacks standing to assert those claims. Although the Ninth Circuit acknowledged *Navin*, it found that Ms. Banning had no power to insist that their child be subjected to unconstitutional state action and mistakenly concluded that the state court order granting her legal custody does not affect Respondent's rights. Ms. Banning declares that their daughter wants to say the Pledge with the words "under God" and she approves of her daughter's desire to do so. Because Ms. Banning has the final decision making authority, and her interests are incompatible with Respondent's claims in this case, Respondent lacks standing to challenge the EGUSD Patriotic Observance policy. Alternatively, the lower federal courts lacked federal subject matter jurisdiction based on the *Rooker-Feldman* Doctrine in that Respondent's constitutional claims are inextricably intertwined with the state

custody proceeding.

2. The EGUSD Patriotic Observance policy does not violate the Establishment Clause of the First Amendment when it requires teachers to lead willing students in reciting the Pledge with the words "under God." In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), this Court implicitly authorized the voluntary recitation of the Pledge by students in public schools. The logical conclusion is that an objecting student's First Amendment rights are not violated when he or she is exposed to willing students reciting the Pledge. The fact that Respondent's daughter (a willing reciter of the Pledge) is exposed to other students reciting the Pledge with the words "under God" does not constitute a violation of the Establishment Clause. Further, if the Pledge does not violate the Establishment Clause, then the EGUSD policy, by extension, cannot violate the Establishment Clause.

The Pledge does not violate the coercion test set forth in *Lee v. Weisman*, 505 U.S. 577 (1992), because it does not result in students being subjected to a religious act or statement of religious belief. The Pledge is simply a patriotic expression, that includes a reference to God, which reflects a long standing philosophy of government. Ceremonial references to God, such as the statement "under God" in the Pledge, have repeatedly been recognized by this Court to be consistent with the Establishment Clause. In *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993), the Seventh Circuit properly concludes that an Illinois statute requiring recitation of the Pledge at school by willing students does not violate the Establishment Clause. In *Sherman*, the Seventh Circuit correctly relied on the founding fathers' use of ceremonial references to God as well as pronouncements by this Court regarding the constitutionality of the Pledge in finding that ceremonial references to God do not result in the "establishment" of religion

in violation of the Establishment Clause. *Id.* at 445.

Common sense and historical analysis also support a finding that the Pledge is constitutional. The Pledge has become woven into the "fabric of our society" due to the history and unbroken practice of children and adults of this country reciting it, including the words "under God," for the past fifty years. The Pledge also satisfies both the three part test set forth in *emon v. Kurtzman*, 403 U.S. 602 (1971) and the two part "endorsement" test set forth in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984). Upon reaffirmance of this Court's precedent that the Pledge does not violate the Establishment Clause, then the EGUSD's Patriotic Observance policy must be deemed constitutional.

ARGUMENT

I

RESPONDENT DOES NOT HAVE STANDING TO BRING THE INSTANT ACTION.

Respondent has requested that a federal court intercede in the educational and religious upbringing of his child when the state court has awarded that right to the mother of the child. Petitioners respectfully submit that Respondent lacks standing to assert his claim as a parent because his rights are incompatible with the mother's exercise of her rights as the custodial parent under state law.[3] Alternatively, review is precluded because the lower federal

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[3] In the complaint, Respondent asserts four bases for standing: (1) as a parent; (2) as a taxpayer; (3) as a potential teacher; and (4) as "next friend" to

courts lacked federal subject matter jurisdiction based on the *Rooker-Feldman* Doctrine.

If Respondent lacks standing to bring this suit, this court lacks jurisdiction to consider it. *Steel Co. v. Citizens For a Better Env't*, 523 U.S. 83, 95 (1998). A lack of jurisdiction may be raised even if "for the purpose of correcting the error of the lower court in entertaining the suit." *Id.* at 95, *citing United States v. Corrick*, 298 U.S. 435, 440 (1936); *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934) (jurisdiction must be satisfied at all levels of review). Respondent has the burden of establishing standing. *Steel Co.*, 523 U.S. at 104.

In order to establish standing, Article III of the Constitution requires that Respondent show at an "irreducible minimum": (1) he has suffered a distinct and palpable injury as a result of the putatively illegal conduct of the defendant; (2) the injury is fairly traceable to the challenged conduct; and (3) it is likely to be redressed if the requested relief is granted. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

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were used for recitation of the Pledge. *See ASARCO, Inc. v. Kadish*, 490 U.S. 605, 613-14 (1989) (in order to establish standing requirements for municipal taxpayers, it must be shown taxes were paid directly to entity and that tax revenues are expended on the disputed practice); *Doremus v. Board of Educ.*, 342 U.S. 429 (1952); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789 (9th Cir. 1999) (holding no taxpayer standing to challenge school policy because there were no allegations that taxes were spent solely on the challenged activity). With respect to standing as a potential teacher, Respondent has failed to allege he is a teacher or has been harmed in any way as a teacher; thus his alleged injury in that regard is speculative. *See e.g. Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Lastly, as for the "next friend" allegation, on September 25, 2002, a California Superior Court enjoined Respondent from

> The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Larson v. Valente*, 456 U.S. 228, 39 (1982), *citing Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 72 (1978), *quoting Baker v. Carr*, 369 U.S. 186, 204 (1962).

Respondent cannot rest his claim on the legal rights or interests of a third party. *Warth v. Seldin*, 422 U.S. 490, 499 n.10. (1975). Federal courts refrain "from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances' pervasively shared and most appropriately addressed in the representative branches." *See Valley Forge*, 454 U.S. at 474-75, *quoting Warth*, 422 U.S. at 499-500. The required injury must be both real and immediate, not conjectural or hypothetical. *Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983).

1. Parents' Rights to Direct the Upbringing of Their Minor Child May Be Limited By State Law.

It is well settled that parents have a fundamental right to make decisions concerning the care and upbringing of the their children. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Parham v. J. R.*, 442 U.S. 584, 602 (1979). Likewise, the field of family law, including the rights of husband and wife, parent and child, "belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U.S. 586, 593-94 (1890); *Accord Rose v. Rose*, 481 U.S. 619 (1987). To date, however, this Court has not

addressed whether a noncustodial parent retains the right to assert alleged violations of his constitutional rights with respect to the educational or religious upbringing of his minor child when the challenged interests may be incompatible with the interests of the custodial parent to whom the state court has awarded final decision making authority over that interest. Petitioners submit that the case law relied upon by the Ninth Circuit in determining whether Respondent has standing as a noncustodial parent to assert the claims herein was either inapposite or misapplied and the proper legal standard to address standing was adopted by the Seventh Circuit Court of Appeals in *Navin v. Parkridge Sch. Dist.*, *64*, 270 F.3d 1147 (7th Cir. 2001). Based on the application of *Navin* to the instant matter, as more fully set forth below, it is clear that Respondent lacks standing to assert the claims being asserted in this case.

a. The Cases Cited by the Ninth Circuit Do Not Provide Respondent With Standing When He Does Not Have Legal Custody.

In finding Respondent has standing to challenge "a practice that interferes with his right to direct the religious education of his daughter," the Ninth Circuit relied on its own decisions in *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 795 (9th Cir. 1999) (*en banc*), and *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985). App. 7-8. Petitioners submit that neither case is determinative of the standing issue in the instant case.

Doe did not address the question of whether a parent has standing to challenge Establishment Clause violations based on the right to direct the religious training of his child. Instead, the *Doe* Court determined that a parent did not have standing as a taxpayer to challenge prayer at a high school graduation. *Id.* at 794-97. Thus, *Doe* does not provide Respondent with a basis for standing

in this case.

In *Grove*, the Ninth Circuit found that a parent has standing to challenge alleged violations of the Establishment Clause of the First Amendment based upon the right to control the religious upbringing of her minor child. The decision in *Grove* does not clearly state whether the Groves were married but refers to "Mrs. Grove." 753 F.2d at 1531. In any event, the decision in *Grove* did not address the issue of whether a noncustodial parent would have standing to assert claims under the establishment clause.

In determining that Respondent had standing in this case, the Ninth Circuit also relied on this Court's decisions in *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Schempp*, this Court found that parents and their school children had standing to assert claims for alleged violations of the First Amendment with respect to the laws and practices of reading the Bible in public schools because they were directly affected by that conduct. 374 U.S. at 224 n.9 (1963). In *Yoder*, this Court did not concern itself with whether the parents had standing. Justice Douglas, in his dissent, appeared satisfied that the parents, as defendants in a criminal matter, had standing to raise the right to exercise their religion. 406 U.S. at 242 (Douglas, J., dissenting) ("It is, of course, beyond question that the parents have standing as defendants in a criminal prosecution to assert the religious interests of their children as a defense."). Similar to *Doe* and *Grove*, neither *Schempp* nor *Yoder* involved parents who had anything other than full parental custody rights. Thus, none of the cases relied upon by the Ninth Circuit are authority for the proposition that a noncustodial parent with limited rights to the educational and religious upbringing of his minor child has standing to assert claims for alleged violations of the Establishment Clause.

b. The Seventh Circuit Has Adopted the Proper Legal Standard to Evaluate a Noncustodial Parent's Standing.

In *Navin v. Park Ridge School Dist. 64*, 270 F.3d 1147, 1148 (7th Cir. 2001), the Seventh Circuit reviewed a dismissal of an action brought by a noncustodial parent based on lack of standing. In interpreting the Individuals with Disabilities Education Act (IDEA), the court noted that "nothing in the IDEA overrides [the] states' allocation of authority as part of a custody determination." *Id.* As a result, the Seventh Circuit determined that the standing of a noncustodial parent is dependent on the parental rights granted or reserved to that parent in the divorce decree. *Id.*; *see also Taylor v. Vermont Dep't of Educ.*, 313 F.3d 768 (2nd Cir. 2002). Because the noncustodial parent retained some rights, the Seventh Circuit remanded the case to the District Court to determine whether the claims of the noncustodial parent were incompatible with how the custodial parent was exercising her rights to direct the educational upbringing of the child. *Navin*, 270 F.3d at 1149-50. If the claims of the noncustodial parent were compatible with the rights being exercised by the custodial parent, then the noncustodial parent may be able to assert his claim. *Id.* at 1150. If the noncustodial parent's claims were not compatible with the custodial parent's exercise of rights, however, then the noncustodial parent lacks standing to assert a claim. *Id.*

The Ninth Circuit partially adopted the approach in *Navin* in denying the Motion to Intervene filed by the mother of Respondent's child. J.A. 142-44; *Newdow v. United States Cong.*, 313 F.3d 500, 506 (9th Cir. 2002). The Ninth Circuit reviewed the custody award and correctly found that the custodial mother has the final decision making authority with respect to the educational and religious upbringing of their child. J.A. 144. Consistent with *Navin*, the Ninth Circuit also determined that Respondent retains

some parental rights. Thereafter, in accordance with *Navin*, the Ninth Circuit should have determined whether Respondent's claims in this case are compatible with the custodial parent's exercise of her rights with respect to the educational and religious upbringing of their minor child. Instead, the Ninth Circuit merely concluded that the custodial parent had no power to insist that her child be subjected to unconstitutional state action. Petitioners submit that if the Ninth Circuit had conducted the proper analysis as set forth in *Navin*, then there is but one inescapable conclusion, Respondent lacks standing to assert the claims in this case.

The Ninth Circuit's conclusion that the EGUSD Patriotic Observance policy is an unconstitutional state action presupposes standing. Regardless of what action or inaction the custodial parent may take with respect to state action which is allegedly unconstitutional, that does not bestow any greater rights on Respondent. Moreover, standing is assessed based upon the position of the person seeking redress in relation to the state action being challenged, but does not arise from the state action itself. To that end, this court rejected the theory of "hypothetical jurisdiction" in *Steel Co.*, 523 U.S. at 93-102. In this case Respondent's rights flow from his status as a parent, or not at all. Thus, in concluding that the EGUSD Patriotic Observance policy is unconstitutional the Ninth Circuit cannot confer standing upon Respondent to assert the claims in this case.

The fact that Respondent may have retained some of his rights as a parent does not automatically result in his having standing to assert the claims in this case. Naturally, some rights are retained; but Respondent does not have the right to direct the education and religious upbringing of his daughter in school under the custody order. The Ninth Circuit simply ignored that the mother maintains legal and physical custody of the child during the school week, and also maintains the right to direct the education of the child while in her physical custody. While

Respondent has a right to provide input, the wishes of the mother prevail when the parents disagree. J.A. 88, 127-28. Here, the record demonstrates that the parents disagree as to how the child should be educated and what the child should be exposed to while in school. Thus, the record establishes that the claims being asserted by Respondent in this case are incompatible with the mother's exercise of her rights to direct the educational and religious upbringing of the minor child. Therefore, consistent with the custody order issued by the state court, Respondent loses the right to object to the educational and religious upbringing of his minor child and, absent any injury to that right, Respondent lacks standing to assert the claims in this case.

More important, the fact that Respondent may have retained some of his rights does not automatically result in standing to assert the claims in this case. As the Seventh Circuit correctly points out, it is necessary to review the claims being asserted by Respondent to determine if they are compatible with the mother's use of her rights to direct the educational and religious upbringing of the minor child. Thus, the determination of whether Respondent has standing in this case depends on whether Respondent has the ability to direct his minor child's educational and religious upbringing under the custody order. In order to make that determination, Petitioners respectfully submit it is necessary to review the California Child Custody Law and the Custody Order in Respondent's California Family Law case to define Respondent's rights and standing in this case.

2. Ms. Banning Has Final Decision Making Authority Over the Education and Religious Upbringing of Respondent's Child.

The California Legislature has adopted a comprehensive statutory scheme for determining custodial rights for parents. Cal.

Family Code §§ 3000 et seq. Guided by the provisions of the California Family Code and the compelling state interest of providing for the best interest of the child, California Superior Courts determine the extent of the parents' rights. *See e.g. Montenegro v. Diaz*, 26 Cal. 4th 249, 255 (2001) (under the statutory scheme, absent agreement between the parents, the court has "the widest discretion to choose a parenting plan that is in the best interest of the child."). If a noncustodial parent disagrees with the custodial parent on the interpretation of the custody order, the remedy is before the family court. *Id.* at 259.

In formulating a parenting plan, "the court shall specify the rights of each parent to physical control of the child in sufficient detail . . . ." Cal. Family Code § 3084. When the parents share physical custody,[4] the parent with whom the child is with at any particular point in time carries the right to direct the activities of the child while the child is in his or her physical custody. Cal. Family Code § 3083. Legal control is explained under California Family Code section 3083 which states:

> [T]he court shall specify the circumstances under which the consent of both parents is required to be obtained in order to exercise legal control of the child and the consequences of the failure to obtain mutual consent. In all other circumstances, either parent acting alone may exercise legal control of the child. An order of joint legal custody shall not be construed to permit an action that is inconsistent with the physical custody order unless the action is expressly authorized by the court.

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[4] Joint physical custody is an exception where the child "shuttles back and forth between two parents" spending nearly equal time with each parent. *In re Marriage of Whealon*, 53 Cal. App. 4th 132, 142 (1997).

Joint legal custody is defined as both parents *sharing* the right to make decisions regarding the health, education and welfare of their child. Cal. Family Code § 3003.

In deciding the physical and legal control issues in a custody determination, it is axiomatic that the constitutional rights of one or both of the parents may be circumscribed. *See e.g. In re Marriage of Burgess*, 13 Cal. 4th 25, 32 (1996) (the custodial parent has the superior right to move and take the child subject to the rights of the noncustodial parent to show such move is not in the best interests of the child); *Miller v. Hedrick*, 158 Cal. App. 2d 281 (1958) (upholding a custody order in which a noncustodial father was restrained from requiring his child to engage in any religious activities other than those directed by the mother).

With respect to religious upbringing, the custodial parent clearly has the right to make ultimate decisions regarding the child's religious upbringing. *In re Marriage of Murga*, 103 Cal. App. 3d 498, 505 (1980). While the noncustodial parent is entitled to discuss religion with the child, when the parents are at odds on such discussions, courts recognize the liberties of one of the parents may be limited. *In re Mentry*, 142 Cal. App. 3d 260, 265 (1983).

In this case, a California Superior Court awarded Ms. Banning, the mother of Respondent's minor child, sole legal custody on February 6, 2002. J.A. 82. Respondent sought to amend this custody determination and, on September 11, 2003, the Court modified the order awarding "joint" legal custody to both parents.[5] J.A. 127-28. However, the Court expressly limited Respondent's rights by dictating that Ms. Banning retains the right to make the final decision on matters involving the child's upbringing if Respondent and Ms. Banning disagree. J.A. 127-28.

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[5] Respondent has appealed this interim order to the California Court of Appeal, Third Appellate District, Case Nos. C040840 and C042384.

Based on the custody order, Ms. Banning maintains physical and legal control over the minor child during the school week. J.A. 122.

3. Respondent Lacks Standing Under Article III Based on *Navin* and His Status as a Noncustodial Parent.

Respondent has not suffered a distinct and palpable injury with respect to the claims being asserted in this case. Respondent is essentially seeking an order that prevents his daughter from both hearing and reciting the Pledge. Ms. Banning declares that she is raising her daughter as a Christian and her daughter wants to say the Pledge with the words under God and that she approves of their daughter's desire to do so. J.A. Respondent is an atheist (J.A. 48) and does not want his daughter exposed to the Pledge at school because it contains the words "under God." J.A. 49. Therefore, Ms. Banning and Respondent patently disagree as to the religious upbringing of their daughter. Clearly, the relief sought by Respondent is incompatible with the rights being exercised by Ms. Banning as the custodial parent. Because Ms. Banning is the final decision making authority with respect to the educational and religious upbringing of their daughter, Respondent does not have the right to object to his daughter hearing or reciting the Pledge. For the same reason and based on the analysis in *Navin*, Respondent does not have standing to challenge the constitutionality of the EGUSD Patriotic Observance policy in this case. Furthermore, because Respondent does not have the right to make the final decisions with respect to his daughter's educational or religious upbringing in this instance, he has not personally suffered an actual or threatened injury.

Additionally, the alleged injury is not likely to be redressed by the requested relief. The relief sought here cannot give more,

or less, rights to Respondent than would otherwise be available to him in the custody proceeding. Respondent essentially seeks to have this court stand in loco parentis to impress his will upon the child. Indeed, Respondent could not call the teacher of the child and instruct her on how the child should or should not act during the Pledge. As Respondent does not have the right to direct his daughter's education regarding the Pledge, he does not have an injury that can be redressed by this Court. Based on the foregoing, Petitioner respectfully submits that Respondent lacks standing to challenge the school policy of reciting the Pledge.

4. Alternatively, The *Rooker-Feldman* Doctrine Bars Review of This Claim.

Petitioners respectfully submit that the lower federal courts in this case lacked jurisdiction under the *Rooker-Feldman* Doctrine. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Under the *Rooker-Feldman* Doctrine, federal courts lack jurisdiction to review constitutional claims that are inextricably intertwined with a decision of a state court. *Id.*

In this case the state has adjudicated the rights of Respondent and Ms. Banning to the custody of their minor child. The decision is based on the evidence presented and the state court tribunal is clearly the best suited to sort out child custody matters. *See Ankerbrandt v. Richards*, 504 U.S. 689, 704 (1992). In so doing, the state court granted Ms. Banning the final decision making authority with respect to the educational and religious upbringing of their child. In exercising her rights, Ms. Banning has declared that their daughter is being raised as a Christian and is a willing participant in reciting the Pledge. The constitutional claims in this case seek to usurp the rights the state court granted to Ms. Banning by collaterally attacking a school district policy

that willing students recite the Pledge. Thus, Respondent is seeking to interfere with the educational and religious upbringing of his daughter under the guise of a civil rights suit which he could not successfully assert in the state custody proceeding. Moreover, to grant the relief sought by Respondent would effectively invalidate her rights as the custodial parent. Therefore, the constitutional claims raised in this case are "inextricably intertwined" with the state custody proceeding and the *Rooker-Feldman* Doctrine precludes review of this case.

II

THE PATRIOTIC OBSERVANCE POLICY OF THE EGUSD WHICH REQUIRES DAILY RECITATION OF THE PLEDGE BY WILLING STUDENTS IS CONSTITUTIONAL.

Respondent, an atheist, asserts the Pledge violates the Establishment Clause and is thus unconstitutional because it contains the words "under God." J.A. 41-46. EGUSD's Patriotic Observance policy AR 6115, states in pertinent part "Each elementary school class recite the Pledge of Allegiance to the Flag once each day." J.A. 149. Respondent contends the policy is unconstitutional because his daughter is subjected to the sectarian Pledge on a daily basis. J.A. 49. This, he alleges, results in the daily indoctrination of his daughter with religious dogma. J.A. 49. The EGUSD policy is based on California Education Code section 52720 which requires appropriate patriotic exercises be conducted in each public elementary school daily. It is undisputed that the policy only requires teachers to lead willing students in reciting the Pledge. The issue in this case is thus whether the EGUSD policy violates the Establishment Clause.

1. This Court's Holding in *West Virginia State Board of Education v. Barnette* Dictates the EGUSD's Patriotic Observance Policy is Constitutional.

In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943), this Court held that a West Virginia regulation that required schoolchildren in the state to recite the Pledge[6] or be considered insubordinate was unconstitutional. The plaintiffs in *Barnette* were Jehovah's Witnesses students who, in accordance with their religious beliefs, refused to salute the flag. *Id.* at 629. In deciding the case, this Court noted that compulsory recitation of the Pledge "requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks," as well as " . . . affirmation of a belief and an attitude of mind." *Id.* at 633. Ultimately, this Court summarized its finding as follows:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Id. at 642.

Despite concerns that compelling students to recite the Pledge violated students' free speech rights under the First Amendment by compelling political ideology, this Court did not forbid recitation of the Pledge in public schools. Instead, this Court determined that states (and school districts) cannot compel students to recite the Pledge. Since that time, the clear import of

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[6] Petitioners recognize the Pledge did not contain the phrase "under God" when *Barnette* was decided.

Barnette has been that the voluntary recitation of the Pledge by public school children throughout this country, which inspires patriotism and love of country, is constitutionally permissible.

In the instant case, the *Newdow II* majority found that the mere presence of an objecting student in the classroom while students recite the Pledge with the words "under God" has a coercive effect. App. 13-14. However, the *Newdow II* majority failed to consider that in *Barnette* this Court implicitly authorized the voluntary recitation of the Pledge by students in public schools. The logical result is that an objecting student's First Amendment rights are not violated when he or she is exposed to willing students reciting the Pledge. There is simply no logical reason to differentiate between the rights at stake in this case and those in *Barnette*. Here, as in *Barnette*, the question is whether students are compelled to declare a belief in violation of the First Amendment. In either case, the content of the Pledge is arguably inconsistent with or contrary to one's belief. Because the EGUSD Patriotic Observance policy is consistent with this Court's holding in *Barnette*, it is constitutionally permissible.

2. The EGUSD Policy Does Not Violate the Establishment Clause.

Petitioners respectfully submit that in order for this Court to resolve the issue of whether the EGUSD Patriotic Observance policy violates the constitution, this Court must first determine whether the Pledge violates the Establishment Clause. Logic dictates that if the Pledge does not violate the Establishment Clause, then the EGUSD's Patriotic Observance policy cannot violate that clause.

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The purpose of the Establishment Clause is to

prevent the intrusion of either the church or the state upon the other. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). The First Amendment does not require that in every respect there should be separation of church and state. *Zorach v. Clauson*, 343 U.S. 306 (1952). In fact, "[s]ome relationship between government and religious organizations is inevitable." *Lemon*, 403 U.S. at 614. This is because we are "a religious nation," (*Church of the Holy Trinity v. United States*, 143 U.S. 457, 470 (1892)[7]) and "a religious people whose institutions presuppose a supreme being." *Zorach, 343 U.S.* at 313.

This Court has refused "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history. *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970). Instead, this Court has reviewed whether challenged conduct or statutes establish or interfere with religious beliefs or tend to do so. *See Id.* at 669. The Establishment Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614. The Religion Clauses do not prefer that the government "show a callous indifference to religion" or prefer those who believe in no religion over those who do believe. *Zorach*, 343 U.S. at 314. Moreover, they do not bar federal or state regulation of conduct whose effect merely happens to coincide with tenets of some or all religions. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 303 (1963) (Brennan, J., concurring).

In *Schempp*, this Court set forth a test for analyzing whether a legislative enactment violates the Establishment Clause. *Id.* at 222. Specifically, the issues in *Schempp* were: (1) whether a Pennsylvania law that required public schools to begin each day by reading ten verses from the bible to the students was

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[7] This case cites numerous examples of expressions that ours is historically a religious nation.

constitutional; and (2) whether a Maryland statute which required the reading of at least one chapter from the Bible in conjunction with recitation of the Lord's Prayer at the beginning of each school day was constitutional. *Id.* at 205 and 211, respectively. To analyze this, the Court looked to the purpose and primary effect of the enactment. *Id.* at 222. If either the purpose or primary effect is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power. *Id.* Thus, the enactment must have (1) a secular legislative purpose; and (2) a primary effect that neither advances nor inhibits religion. *Id.* at 222-23.

In evaluating the purpose of a statute, if the public entity enacting the legislation expresses a plausible secular purpose in either the text or legislative history, then courts should generally defer to the stated intent. *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J., concurring). The Court is reluctant to attribute unconstitutional motives to public entities when a plausible secular purpose may be discerned from the enactment. *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). This Court has invalidated legislative or governmental actions finding a secular purpose is lacking only when it has concluded there is no question that the statute or activity was motivated wholly by religious considerations. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). Thus, the purpose of an enactment or action does not have to be exclusively secular. *Id.* at 681; *Wallace*, 472 U.S. at 64 (Powell, J., concurring).

In 1971, this Court reiterated the test set forth in *Schempp* and added a third step to the test. This test is now commonly referred to as the *Lemon* test. The third step requires the Court to ensure the statute does not foster an excessive government entanglement with religion. *Lemon*, 403 U.S. at 612-13. In analyzing excessive entanglement, factors to evaluate include the character and purpose of the benefitted institutions, the nature of the aid provided and the resulting relationship between the state

and the religious authority. *Roemer v. Board Of Pub. Works*, 426 U.S. 736, 748 (1976). To create excessive entanglement, "comprehensive, discriminating, and continuing state surveillance" is necessary. *Mueller*, 463 U.S. at 403.

By 1973, this Court recognized the three-step test set forth in *Lemon* merely constituted principles which should govern the consideration of challenges to statutes which allegedly violate the Establishment Clause and stated the principles were no more than helpful signposts. *Hunt v. McNair*, 413 U.S. 734, 741 (1973). This was noted again in *Mueller*, 463 U.S. at 394.

In 1983, this Court departed from the *Lemon* test in reviewing the constitutionality of legislative prayer in the Nebraska Legislature. *Marsh v. Chambers*, 463 U.S. 783 (1983). There this Court considered the Nebraska Legislature's practice of opening its daily sessions with a prayer lead by a chaplain who was paid by the state. In reaching a decision, this Court reviewed the history of legislative prayer at both the national and state levels. *Id.* at 792. Also considered was the fact that three days after Congress authorized the appointment of paid chaplains for the houses of Congress, the same men finalized the language of the Bill of Rights. *Id.* at 788.

This Court went on to state, "it is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and, indeed, predates it. Yet an unbroken practice . . . is not something to be lightly cast aside." *Id.* at 790. In light of this unbroken history, the Court concluded the practice of opening legislative sessions with prayer had become a part of the "fabric of our society" and thus did not violate the Establishment Clause. *Id.* at 792.

Thereafter, in 1984, Justice O'Connor proposed what has since been labeled the "endorsement test" in her concurring opinion in *Lynch*. 465 U.S. at 688. This test requires the Court to

determine whether a government action or enactment: (1) creates an excessive entanglement with religious institutions; or (2) endorses or disapproves of religion. *Id.* "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message." *Id.* In answering the endorsement question, the Court must examine what the government intended to communicate and what was actually conveyed. *Id.* at 690.

> The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law or policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored and preferred.

Wallace, 472 U.S. at 70 (O'Connor, J., concurring). The relevant issue in the endorsement inquiry is whether an objective observer, acquainted with the text, legislative history and implementation of the statute, would perceive it as a state endorsement of religion. *Id.* at 76. The objective observer is similar to the "reasonable person" in tort law. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O'Connor, J., concurring).

Yet another means of analyzing the constitutionality of a statute for violation of the Establishment Clause was fashioned in *Lee v. Weisman*, 505 U.S. 577 (1992). In what became known as the "coercion test," this Court evaluated whether state sponsored invocation and benediction prayers at a public school graduation were constitutional. Essentially, *Lee* applied the standard set forth in prior school prayer cases which states that the government may

not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes or tends to establish a religion or religious faith. *Id.* at 586-87.

With the various analytical tests set forth in this Court's Establishment Clause jurisprudence, it is clear that each new Establishment Clause challenge must be evaluated on its own merits to determine whether any of the aforementioned tests, or perhaps some other analytical tool, is best suited to determine whether the challenged action or statute is constitutional. As Justice O'Connor noted in her concurring opinion in *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 720 (1984),

> Experience proves that the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches.

Rather than consider which, if any, of the applicable tests might be best to evaluate the constitutionality of the EGUSD's Patriotic Observance policy, the *Newdow II* majority indicated it was free to apply the *Lemon*, endorsement or coercion test and chose only to apply the coercion test. App. 11. In applying the coercion test, the *Newdow II* majority failed to correctly do so as they assumed the Pledge is a religious act rather than a simple patriotic exercise. App. 11-12. Moreover, they applied the coercion test despite the fact it has only been utilized by this Court to review school prayer cases. *See Lee*, 505 U.S. at 586-87; *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (student-led prayer before football games).

In addition, the *Newdow II* majority failed to give proper consideration to prior pronouncements of this Court wherein the

Pledge was expressly acknowledged to be consistent with the Establishment Clause. The *Newdow II* majority also did not recognize the applicability of the analytical framework utilized by the Seventh Circuit to evaluate the constitutionality of the Pledge in *Sherman v. Community Consol. Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992), *cert. denied*, 508 U.S. 950 (1993). Moreover, the *Newdow II* majority did not explain why they felt the coercion test best addressed the issues in the instant case nor did they explain why they did not consider the *Marsh* "fabric of our society" test or some other analytical test derived from this Court's jurisprudence. Petitioners submit that had the *Newdow II* majority properly considered the above, they would have found the EGUSD Patriotic Observance policy to be constitutional.

a. The Pledge is Not a Religious Act or a Profession of Religious Belief and Thus Does not Fail the Coercion Test.

In finding that the EGUSD Patriotic Observance policy is unconstitutional, the *Newdow II* majority found the EGUSD's policy "impermissibly coerces a religious act" because the phrase "under God" in the Pledge constitutes a profession of a religious belief rather than a mere acknowledgment that many Americans believe in God or that religion played a role in the establishment and development of the United States. App. 11-12. As Judge O'Scannlain observed in his dissent from the denial of rehearing *en banc* in this matter, the *Newdow II* majority did not analyze whether the Pledge is a religious act, but instead simply assumed this fact. App. 78.

Prayer has been defined by this Court as "a solemn avowal of faith and supplication for the blessing of the almighty." *Engel v. Vitale*, 370 U.S. 421, 424 (1962). Prayer is also defined as "a humble communication in thought or speech to God or to an object

of worship expressing supplication, thanksgiving, praise, confession, etc." THE NEW WEBSTER'S DICTIONARY 315 (1990). Petitioners submit the Pledge with the phrase "under God" is nothing like the clearly religious act of prayer. In no way can the Pledge be construed to be a supplication for blessings from God nor can it be reasonably argued that it is a communication with God. The Pledge is, quite simply, a patriotic act – not a religious act.

A review of this Court's Establishment Clause jurisprudence reveals that at no time has the Court considered the Pledge to be tantamount to a religious act such as a prayer. Petitioners submit that if a mere reference to God in the Pledge transforms the Pledge into a prayer and thus makes it unconstitutional in certain public settings, then other references to God in public life also suffer from the same defect. For example, the Declaration of Independence, the Constitution, the Star Spangled Banner, and Lincoln's Gettysburg Address, to name a few, would all have to be excised from public schools. Were the "founders of the United States . . . unable to understand their own handiwork?" *Sherman*, 980 F.2d at 445. While the *Newdow II* majority equates recitation of the Pledge to recitation of a prayer, the foregoing reveals that neither the Pledge nor other historical references to God are transformed into prayers, or something akin thereto, merely because they refer to God. As the Pledge is not a religious act, the *Newdow II* majority misapplied the coercion test.

To the extent the *Newdow II* majority found that recitation of the Pledge is to swear allegiance to the values for which the flag stands and thus results in the swearing of allegiance to a belief in God, a simple reading of the Pledge does not support such an interpretation. While the beginning of the Pledge is an affirmation by the person reciting it, swearing allegiance to the flag as a representative symbol of the United States of America, the speaker is not pledging allegiance, or indicating a belief, to the second half

of the Pledge which reads "one nation under God, indivisible, with liberty and justice for all." These statements are merely descriptive of the historical ideals upon which the country was founded. While one swears allegiance to the flag and country, one does not swear allegiance to descriptive statements or historical ideals. Rather, the descriptive statements are included in the Pledge to give persons reciting the Pledge an idea about the historical underpinnings of the United States, i.e. that the nation is indivisible, was established for the purpose of promoting liberty and justice for all, and was founded by persons who believed in God and believed the nation's growth and development was tied to God. This reading of the meaning of the words "under God" in the Pledge is supported by the legislative history surrounding the 1954 amendment to the Pledge. Specifically, the House Report reveals:

> From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God. For example, our colonial forebears recognized the inherent truth that any government must look to God to survive and prosper.

H.R. Rep. No. 83-1693, at 2 (1954).

The House Report further noted references to God in the Declaration of Independence, the inscription of "In God We Trust" on currency and coins, and references to God in the Gettysburg Address. *Id.* Representative Louis C. Rabaut, in describing the need for the legislation, stated, "By the addition of the phrase 'under God' to the pledge, the consciousness of the American people will be more alerted to the true meaning of our country and its form of government." *Id.* at 3. He further stated that "the

children of our land, in the daily recitation of the pledge in school, will be daily impressed with a true understanding of our way of life and its origins." *Id.* These remarks reveal Representative Rabaut felt the amendment would help teach children about the role of religion in the history of the United States.

Most important in evaluating whether the amendment to the Pledge is intended to promote a belief in God is an opinion authored by the Legislative Reference Service of the Library of Congress about how the words "under God" should be inserted into the Pledge. The Legislative Reference Service determined that the phrase "under God" was a modifier to the phrase "one Nation" because the addition was intended to affirm that the United States was founded on a fundamental belief in God. This analysis underscores the idea that the addition of the phrase "under God" to the Pledge was secular in purpose.

The *Newdow II* majority also erred in analyzing the coercive effect of the statement "under God" by itself as opposed to in the context of the Pledge. *See* App. 12. When students recite the Pledge, they do not merely recite the words "under God," they recite the Pledge in its entirety. Thus, it is an analytical anomaly to examine the effect of those two words rather than the effect of the Pledge as a whole. Morever, in conducting the Establishment Clause analysis, this Court has consistently analyzed religious text and symbols in context rather than looking at merely the alleged religious content alone. *Lynch*, 465 U.S. at 680. For example, in *Lynch* this Court evaluated the effect of a creche that was included in a display that also contained secular symbols of Christmas and found that in context, the creche did not convey a message of governmental endorsement of religion. *Id.* at 680-86.

Similarly, in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 616-20 (1989), this Court looked at the entirety of a Christmas display that included a Christmas tree, a menorah and a liberty sign and found the menorah did not

convey an endorsement of religion. Thus, despite the fact the words "under God" were added to the Pledge in 1954, they must be evaluated in the context of the entire Pledge.

When one looks at the entire Pledge, the Pledge does not convey a message of religious belief or endorsement. Because the Pledge is not a religious act, nor is it a statement of religious belief, the EGUSD Patriotic Observance policy cannot fail the coercion test. Listening to the recitation of the Pledge simply does not coerce an objecting child to support or participate in religion.

b. This Court Has Uniformly Stated The Pledge is Consistent With the Establishment Clause and is Thus Constitutional.

Petitioners submit the EGUSD policy is also constitutional because this Court has repeatedly observed that the Pledge is consistent with the Establishment Clause. While the specific issue of whether the Pledge as currently codified is constitutional has not heretofore been expressly decided by this Court, the subject of the constitutionality of patriotic expressions containing references to God, such as the Pledge, have been discussed by this Court for over forty years.

In *Engel*, this Court held that state officials could not require the recitation of a prayer in public schools at the beginning of each school day, even if the prayer was denominationally neutral and students who did not wish to participate could be excused while the prayer was being recited. 370 U.S. at 430-33. In reaching its conclusion, this Court noted:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical

> documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bare no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.

Id. at 435 n.21.

One year later, Justice Brennan examined the allegedly secular justification behind a statute requiring daily readings from the Bible noting the justification was to foster harmony and tolerance among the pupils, to enhance the authority of the teacher and to inspire better discipline. *Schempp*, 374 U.S at 280 (Brennan, J., concurring). He then questioned why "non-religious means" could not have been used to achieve the noted goals.

> It has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, or even the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.

Id. at 281. Thus, Justice Brennan did not consider the Pledge to be

a statement of religious expression.

Justice Brennan went on to explain that certain activities do not have religious meaning due to the fact that such activities have been so interwoven into the fabric of our society that their use "may well not present that type of involvement which the First Amendment prohibits." *Id.* at 303. He found this principle insulates various patriotic exercises and activities utilized in public schools which, whatever their origins, have ceased to have any religious purpose or meaning. *Id.* As a result, the reference to God in the Pledge merely recognizes the historical fact that our nation was believed to be founded under God. *Id.*

In *Lynch*, this Court considered the constitutionality of the city's placement of a creche in a Christmas display that was situated in a park owned by a non-profit organization. 465 U.S. at 671. This Court recognized our nation's history contains numerous official references to vows or invocations of divine guidance in deliberations and pronouncements of the founding fathers. *Id.* at 675. Examples include references to God in the national motto ("In God We Trust") and in the Pledge ("one nation under God"). *Id.* at 676. This Court noted that such references to God are consistent with our history and do not violate the Establishment Clause. *Id.* Importantly, the Court made this statement while also acknowledging the Pledge is recited by many thousands of public school children each year. *Id.* Thus, it is difficult to understand how the *Newdow II* majority reaches the conclusion that recitation of the Pledge has a coercive effect on objecting students who must listen to willing students recite the Pledge, when this Court has previously acknowledged recitation of the Pledge is constitutional in public schools.

In concurring in this Court's decision in *Lynch*, Justice O'Connor noted that the creche was,

> [N]o more an endorsement of religion than such

> governmental "acknowledgments" of religion as legislative prayers of the type approved in *Marsh* (citation omitted), government declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court." Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs.

Id. at 692-93.

Justice Brennan also again commented on the constitutionality of the Pledge, suggesting:

> [S]uch practices as the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as a form of "ceremonial deism," (footnote omitted) protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content. (Citation omitted.) Moreover, these references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national

> challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases.

Id. at 716-17 (Brennan, J., dissenting).

Justice O'Connor specifically acknowledged the constitutionality of the phrase "under God" in the Pledge in *Wallace*, 472, U.S. at 78 n.5 (1985) (O'Connor, J., concurring). There, she noted the words "under God" in the Pledge, "serve as an acknowledgment of religion with the 'legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'"

In *County of Allegheny*, this Court reviewed the constitutionality of a display of a creche and a menorah during the Christmas season. 492 U.S. at 602-03. This Court noted:

> Our previous opinions have considered in dicta the the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief. (Citation omitted.) We need not return to the subject of "ceremonial deism," (citation omitted) because there is an obvious distinction between creche displays and references to God in the motto and the pledge.

Id. Thus, the Court has consistently noted for over twenty-four years the Pledge does not violate the Establishment Clause.

Despite the foregoing, the *Newdow II* majority ignored this Court's pronouncements on the subject and rationalized that its decision was "not inconsistent" with the "dicta" of this Court. App. 15. In so doing, the *Newdow II* majority attempted to harmonize its decision with the decision reached by this Court in

Engel by stating that the Pledge differs from the Declaration of Independence and the National Anthem (mentioned in *Engel*) because its reference to God is not merely a reflection of the author's profession of faith, but is designed to constitute an affirmation by the person reciting it. App. 16. As described above in section II.2.A, the Pledge does not result in the affirmation of a belief in God. Therefore, the majority's distinction is untenable.

The *Newdow II* majority also acknowledged this Court's pronouncements in *Lynch* and *Allegheny* regarding the constitutionality of the Pledge, and even noted that in *Lynch* this Court observed that students recite the Pledge daily. App. 15-16. Despite this, the *Newdow II* majority found the two references in those cases do not speak to the issue in the instant one. While those cases did not involve a direct challenge to the Pledge, the statements regarding the Pledge contained in each could not have been any clearer in indicating the Pledge is constitutional.

Over the span of twenty-seven years, this Court has steadfastly found that "references to the Almighty that run through our laws, our public rituals, [and] our ceremonies" are consistent with constitutional principles and do not run afoul of the Establishment Clause. *Zorach*, 343 U.S. at 313. An example of such a public ceremony or ritual is the Pledge. Members of this Court have repeatedly indicated the Pledge does not violate the Establishment Clause. Therefore, it follows that if the Pledge itself does not violate the Establishment Clause, then the EGUSD Patriotic Observation policy requiring teachers to lead willing students in reciting the Pledge also cannot violate the Establishment Clause.

c. *Sherman* Correctly Decides the Pledge is Constitutional.

Prior to the instant case, the only appellate court to

consider the constitutionality of the Pledge was the Seventh Circuit which held that a state statute requiring recitation of the Pledge each day in elementary schools is constitutional. *Sherman*, 980 F.2d at 448. Even though the *Sherman* court did not explicitly apply the *Lemon*, endorsement or coercion tests, it did utilize the analytical flexibility inherent in this Court's Establishment Clause decisions to formulate an appropriate analysis to examine the constitutionality of the Pledge. This analysis adopted the spirit of *Lynch* where it was stated in reference to the Establishment Clause, "[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criteria in this sensitive area." 465 U.S. at 679, *citing Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971). While, the *Newdow II* majority criticized the *Sherman* Court for failing to use the *Lemon* or coercion tests, the fact that the Seventh Circuit did not do so was perfectly appropriate since this Court never expressly applied any of those tests in reaching the conclusion that the Pledge does not violate the Establishment Clause.

In reviewing the Pledge, the *Sherman* Court asked whether ceremonial references in civic life to a deity constitute prayer or support for monotheistic religions to the exclusion of atheists. The Court answered the question by relying upon history as a guide, similar to the approach used by this Court in *Marsh*. 980 F.2d at 445. The Seventh Circuit reviewed references to God by Presidents George Washington and James Madison, the author of the First Amendment, references to the opening of Court sessions with the cry "God save the United States and this honorable Court," and references to God contained in the Declaration of Independence. *Id.* at 445-46. From this, Judge Easterbrook gleaned that the founding fathers did not deem ceremonial invocations of God "established" religion. *Id.* He then examined this Court's statements regarding the constitutionality of the Pledge and found them to be consistent with the idea that

ceremonial references to God are distinguishable from prayer or other actions "establishing" religion. *Id.* at 446-48. As a result, the Seventh Circuit ruled the Pledge is constitutional. *Id.*

Petitioners submit the *Sherman* analysis is useful for reviewing the constitutionality of ceremonial references to a deity as it gives appropriate credence to the concept that the authors of the Establishment Clause engaged in such ceremonial references even after passing the First Amendment. Common sense dictates that the framers would not have acted in a manner which would have violated the very clause they created. An application of the *Sherman* approach results in a finding that the Pledge is constitutional and, by extension, the EGUSD Patriotic Observance policy is also constitutional.

d. The Pledge is Constitutional Under *Marsh*.

In *Marsh*, this Court recognized that common sense and historical analysis were better suited to address Establishment Clause issues than were any specific tests previously formulated by this Court. In so doing, they looked at the history of legislative prayer and the actions of the founding fathers. *Marsh*, 463 U.S. at 791-92. Specifically of note was the fact that three days after Congress authorized the appointment of paid chaplains for the houses of Congress, the same men finalized the language of the Bill of Rights. *Id.* at 788. This led to the conclusion that the "First Amendment draftsmen [] saw no real threat to the Establishment Clause arising from a practice of prayer [in the legislature]." *Id.* at 791. As a result, this Court held that a state legislature's recital of a prayer is constitutional because it is a long standing, historically accepted practice that has became part of the "fabric of our society." *Id.* at 792.

As applied to the instant case, Justice Brennan opined that the Pledge has become so interwoven into the fabric of our society

that it is consistent with the Establishment Clause. *Schempp*, 374 U.S. at 303. As Justice Brennan made that statement back in 1963 -- just four years after the phrase "under God" was added to the Pledge -- it appears he believed that an extensive practice of reciting the Pledge a specific way was not necessary in finding that it had become a part of the fabric of our society. Petitioners submit it is even more interwoven into the fabric of our society now because it has been recited in its current form with the phrase "under God" for almost fifty consecutive years.

Since "under God" was introduced into the Pledge, the population of the United States has increased by over 120 million citizens.[8] A substantial number of those citizens have been raised and attended school where they recite the Pledge. Those same persons have grown up only knowing the Pledge with the phrase "under God" and have passed this version of the Pledge onto their children. As respondent plead in his Complaint in this action, his own daughter, whom he seeks to protect here from the EGUSD Patriotic Observance policy, knew the Pledge with the words "under God" when she was four years old -- before she even attended the EGUSD. J.A. 69. Thus, the Pledge with the phrase "under God" has become a part of the fabric of our society through constant repetition by schoolchildren and adults across the country during the past fifty years.

The importance of the Pledge as codified is exemplified by the national uproar caused by the Ninth Circuit's decision in the instant case. Immediately after the *Newdow I and Newdow II* opinions were published, Congress adopted multiple resolutions in

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[8] The National Population Estimates prepared by the US Census Bureau estimates the national population of the United States as of July 1, 1954, to be 163,025,854 compared with an increase on July 1, 2001, to an estimated 284,796,887. *See* U.C. Census Bureau website, http://eire.census.gov/popest/data/national/tables/NA-ESST2001-01.php.

support of maintaining the Pledge with the words "under God." *See* H.J. Res. 26, 108th Cong., 1st Sess. (2003), S.J. Res. 7, 108th Cong., 1st Sess. (2003) (each proposing amendment to Constitution to protect the Pledge of Allegiance); S. Res. 71, 108th Cong., 1st Sess. (2003), S. Res. 292, 107th Cong. 2nd Sess. Petitioner submits this uproar was caused because the Pledge has became so interwoven into the fabric of our society.

Thus, the Pledge in its current form has become a part of the fabric of our society and is constitutional under *Marsh*. As a result, the EGUSD Patriotic Observance policy is also constitutional.

3. The EGUSD Patriotic Observance Policy Satisfies the *Lemon* and Endorsement Tests.

The *Newdow II* majority did not apply either the *Lemon* or endorsement tests to the EGUSD policy in its final decision in this case. While Petitioner submits that neither test needs to be applied in this case, each provides a better analytical framework to evaluate the constitutionality of the Pledge than does the coercion test.

Under the first prong of the *Lemon* test, the policy has a secular purpose of encouraging patriotic exercises. The EGUSD policy was enacted to satisfy the mandates of California Education Code section 52720 which is titled "[d]aily performance of patriotic exercises in public schools." Education Code section 52720 states that appropriate patriotic exercises must be conducted at the beginning of the first regularly scheduled class or activity at which the majority of the students at the school normally begin the school day. The recitation of the Pledge is noted as satisfying the requirements of the statute. *Id.* Although there is no EGUSD School Board history from which to ascertain the specific purpose of why recitation of the Pledge was selected as the means of

satisfying Education Code section 52720, it is reasonable to assume the EGUSD adopted recitation of the Pledge to satisfy the Patriotic Observance requirement because the statute noted that the Pledge satisfied the requirement. Since the purpose of an enactment does not have to be exclusively secular to satisfy this prong (*Wallace*, 472 U.S. at 64 (Powell, J., conc.rring)) and a secular purpose is easily discernible, the policy satisfies the first prong of the *Lemon* test.

The second prong of the *Lemon* test is also readily satisfied because the policy does not "advance or inhibit" religion. The effect prong of the *Lemon* test asks whether the practice under review conveys a message of endorsement or disapproval of religion. *Id.*, at 56 n.42, *quoting Lynch* 465 U.S. at 690 (O'Connor, J., concurring). Similarly, the second prong of the endorsement test asks whether the practice endorses or disapproves of religion. Both are satisfied here because the effect of the policy does not convey a message of endorsement or disapproval of religion. Instead it merely endorses the Pledge as a patriotic observance.

In assessing whether a state's action endorses religion, the standard is whether a reasonable person would view a government practice as endorsing religion. *Pinette*, 515 U.S. at 777. The endorsement inquiry is not "about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of [being exposed to] a faith to which they do not subscribe." *Id.* at 779 (O'Connor, J., concurring). A state has not made religion relevant to standing in the community simply because a person might be uncomfortable with an action. *Id.*

Petitioners submit that a reasonable person, under the circumstances of the case, would not find the EGUSD adopted its Patriotic Observance policy to endorse religion as there is no such indication anywhere in the record. Moreover, there is no reasonable basis to find the EGUSD policy in fact endorses

religion because, as demonstrated *infra*, the Pledge is not a religious act nor does it convey a religious belief. Thus, the EGUSD policy satisfies the second prong of the *Lemon* test as well as the effect prong of the endorsement test.

The policy also satisfies the excessive entanglement prong of the *Lemon* and endorsement tests as the EGUSD does not have to continually exercise governmental control over the recitation of the Pledge. Moreover, since the Pledge is not a religious act, there is not an excessive government entanglement with religion.

In summary, should this Court chose to apply either the *Lemon* or the endorsement test, the EGUSD Patriotic Observance policy satisfies either. Therefore, the policy is constitutional and the Ninth Circuit's decision should be reversed.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court reverse the decision of the Ninth Circuit Court of Appeals on the grounds that: (1) Respondent does not have standing to pursue this action; and (2) the EGUSD policy does not violate the Establishment Clause.